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No. ____

Supreme Court, U.S.

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IN THE

Supreme Court of the United States
OCTOBER TERM, 1989

PPG INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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28 pp



QUESTIONS PRESENTED

1. Are effluent limitations "achievable" and "attainable" within the meaning of Sections 301(b)(2)(A) and 304(b)(2)(A) of the Clean Water Act ("Act") when no plant, not even the two plants identified by the Environmental Protection Agency ("EPA" or "Agency") as the best plants in the regulated industry, can comply with all of the limitations?
2. Are effluent limitations "achievable" and "attainable" within the meaning of the Act when they fail to account for all technological variability, thus assuring that unavoidable exceedances will occur at even the best plants that properly operate and maintain EPA-designated pollution control technology?

LIST OF PARTIES

Petitioner is PPG Industries, Inc.* Parties supporting this petition are:

The Dow Chemical Company;
Chemical Manufacturers Association;
National Paint and Coatings Association;
Synthetic Organic Chemical Manufacturers
Association, Inc.;

* PPG Industries, Inc.'s subsidiaries and affiliates are: Ace Insurance Company, Ltd.; Ampaspace S.r.l.; Arkansas Chemicals, Inc.; Asahi-Penn Chemical Company, Ltd.; AZDEL, Inc.; Belletech Corp.; Deutsche Pittsburgh Corning GmbH; Disvica, C.A.; Dongju Industrial Co., Ltd.; Exel, Ltd.; Glaskontoret A/S; Glass Plaza Associates; Glasunit A/S; Guangdong Float Glass Co. Ltd.; Industrie Vernici Italiane S.p.A.; Inveca-Pittsburgh C.A.; J.M. Eltzroth & Associates, Inc.; Lenhardt Machinenbau GmbH; Nippon Pittsburgh Corning, K.K.; PPG Fiber Glass Corporation; PPG Crystal A.G. (PPG Crystal S.A.); PPG Glasexco S.A.; PPG Glass (UK) Ltd.; PPG Iberica, S.A.; PPG Industries Foundation; PPG Industries (France) S.A.; PPG Industries, Inc. (Alaska); PPG Industries Taiwan Ltd.; PPG-Nanchang Chemical Technology Development Corporation, Ltd.; PPG Scandinavia A/S; PPG-Siam Silica Company, Limited; PPG Sweden AB; PPG Vernate Pennitalia S.p.A.; P.T. Asahimas Subentra Chemical Co., Ltd.; Pennvasia Limited; Pittsburgh Corning Corporation; Pittsburgh Corning Europe N.V.; Pittsburgh Corning France S.A.R.L.; Pittsburgh Corning Gesellschaft mbH; Pittsburgh Corning International Sales Company Limited; Pittsburgh Corning Nederland B.V.; Pittsburgh Corning Scandinavia AB; Pittsburgh Corning (Schweiz) AG; Pittsburgh Corning (United Kingdom) Limited; Pittsburgh Plate Glass Company (Alabama); Pittsburgh Plate Glass Company (Delaware); Pittsburgh Plate Glass Company (Maine); Quantum Technologies, Inc.; Separations Technology, Inc.; Silenka B.V.; Silenka Deutschland G.M.B.H.; Silenka France; Silenka U.K. Ltd.; Societe Industrielle, Commerciale et Financiere de Peintures; Taiwan Chlorine Industries Ltd.; Tatung Coatings Co.; VFG-Sudamtex, C.A.; and Vidrio C.A.

Air Products Manufacturing Corporation and
Air Products and Chemical, Inc.;
Akzo Chemicals, Inc.;
Allied-Signal, Inc.;
Dixie Chemical Company, Inc.;
E.I. du Pont de Nemours & Co.;
Ethyl Corporation;
FMC Corporation;
Goodyear Tire & Rubber Company;
Hoechst Celanese Corporation and Hoechst
Celanese Chemical Group, Inc.;
Koppers Company, Inc.;
LaRoche Chemicals, Inc.;
M & T Chemicals, Inc.;
Monsanto Company;
Rubicon, Inc.;
Sherex Chemical Company, Inc.;
Sterling Chemicals, Inc.;
Texas Eastman Company, a division of
Eastman Kodak Company;
Union Carbide Corporation; and
W.R. Grace & Company.

Other parties to the case below were:

United States Environmental Protection
Agency;
Borg-Warner Specialty Chemicals, Inc.;
Courtoulds Fibers, Inc.;
Gulf Coast Waste Disposal Authority;
The Lubrizol Corporation; and
Natural Resources Defense Council.

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**PETITION FOR A WRIT OF CERTIORARI
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Petitioner PPG Industries, Inc. prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit entered on March 30, 1989 and October 10, 1989.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported in *Chemical Manufacturers Association v. EPA*, 870 F.2d 177 (5th Cir. 1989) (hereinafter "CMA I"), and is reprinted in the Appendix at p. 1a. The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing is reported in *Chemical Manufacturers Association v. EPA*, 885 F.2d 253 (5th Cir. 1989) (here-

inafter "CMA *II*"), and is reprinted in the Appendix at p. 173a.

JURISDICTIONAL STATEMENT

The original judgment in this case was entered on March 30, 1989. Petitioner's motion for panel rehearing was denied by the Fifth Circuit on October 10, 1989. This petition for a writ of certiorari has been timely filed pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction to review the judgment and opinions of the Fifth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

This case involves an EPA rulemaking under the Clean Water Act. 33 U.S.C. § 1251 *et seq.* The statutory provisions relevant to this petition are Sections 301(a),(b) and 304(b) of the Act. 33 U.S.C. §§ 1311(a),(b) and 1314(b). These provisions are reprinted in the Appendix at p. 196a. The effluent limitations at issue here are codified at 40 C.F.R. Part 414, and are reprinted in the Appendix at p. 202a.

STATEMENT OF THE CASE

This petition for a writ of certiorari is before the Court because the court below found that a set of effluent limitations is "achievable" and "attainable" within the meaning of Sections 301(b)(2)(A) and 304(b)(2)(A) of the Clean Water Act, 33 U.S.C. §§ 1311(b)(2)(A) and 1314(b)(2)(A), even though those limitations cannot be achieved by any plant in the industry, not even by the two "best" plants on whose performance the limitations were based. The Fifth Circuit conceded that its opinion conflicts with the

Fourth Circuit's decision in *Tanners' Council of America v. Train*, 540 F.2d 1188, 1192-94 (4th Cir. 1976), but expressly declined to follow the Fourth Circuit's decision. *CMA II*, 885 F.2d at 264; App. at 191a. The decision of the court below is also at odds with *Association of Pacific Fisheries v. EPA*, 615 F.2d 794 (9th Cir. 1980); *CPC International, Inc. v. Train*, 540 F.2d 1329 (8th Cir. 1976), cert. denied, 430 U.S. 966 (1977); and *National Lime Ass'n v. EPA*, 627 F.2d 416, 430-51 (D.C. Cir. 1980).

Additionally, this petition is before the Court because the court below held that effluent limitations are achievable even though they are set at a level that can be expected to result in exceedances for each pollutant 1% of the time (for daily maximum limitations) and 5% of the time (for monthly average limitations), and the limitations provide no affirmative defense even though the exceedances are unavoidable. In analogous circumstances, other circuits have deemed EPA regulations to be unattainable. *National Lime*, 627 F.2d at 430-44; *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1271-74 (9th Cir. 1977); *FMC Corp. v. Train*, 539 F.2d 973, 985-86 (4th Cir. 1976).

This petition should be granted because the decision below creates a conflict among the circuits and raises important and recurring issues concerning development of regulations under the Clean Water Act.

A. Statutory Background

Sections 301(b)(2)(A) and 304(b)(2)(A) of the Clean Water Act require EPA to promulgate regulations, known as "effluent limitations guidelines," which are sets of numerical limitations restricting the amounts of pollutants that may be discharged from various

categories or classes of industrial facilities. 33 U.S.C. §§ 1311(b)(2)(A) and 1314(b)(2)(A). These limitations reflect the reduction of pollutants that is achievable using the "best available technology" ("BAT"). *Id.* The Act requires BAT effluent limitations to be "achievable" and "attainable" by the class or category of regulated plants. *Id.*

As a matter of established practice, when developing BAT limitations for a category or class of facilities, EPA identifies the best technology available to treat a set of pollutants and determines whether any plants in the regulated industry effectively use that technology. If no plant in the regulated industry does so, the Agency looks to other industries and, through modeling and technical analyses, transposes that technology to the industry being regulated. Where, as here, some plants in the industry already effectively use the EPA-designated technology, the Agency collects and analyzes data from those plants to determine what pollutant reductions are possible. Data representing BAT-level performance are retained, while data not representing BAT-level performance are excluded from EPA's data base. Based on the data retained in EPA's data base, the Agency then promulgates two limitations (a daily maximum limitation and a monthly average limitation) for each regulated pollutant.

B. Regulatory Background

On November 5, 1987, EPA promulgated effluent limitations guidelines applicable to the more than 1000 plants in the organic chemicals, plastics, and synthetic fibers ("OCPSF") industry. 52 Fed. Reg. 42,522 (1987). Those limitations were challenged in the Fifth

Circuit which had jurisdiction pursuant to 33 U.S.C. § 1369(b)(1)(E).

The OCPSF Guidelines impose daily maximum and monthly average limitations for 66 pollutants. Twenty-eight of those pollutants are volatile compounds for which EPA properly designated a single technology—steam stripping—as BAT. 52 Fed. Reg. at 42,538-41. Steam stripping is a process in which wastewater is preheated to temperatures near boiling and then pumped into the top of a distillation column (usually 20 to 30 feet high). Superheated steam is continuously injected into the bottom of the column. When the steam contacts the wastewater, the volatile compounds evaporate out of the wastewater into the steam and exit through the top of the distillation column into a condenser. The compounds then are removed from the condenser and either recycled or incinerated. The cleansed wastewater exits at the bottom of the distillation column.

BAT-level steam strippers typically remove more than 99% of all of the volatile compounds in the wastestream. A BAT-level steam stripper's effectiveness in treating any single volatile compound, however, depends on the characteristics of the wastestream (*i.e.*, the nature, amounts, and interactions of the pollutants in the wastestream) and the stripper's operating parameters. For example, increasing the temperature of the wastestream in the preheater or increasing the volume and temperature of the steam injected into the distillation column can enhance the stripper's ability to remove certain pollutants but, depending on wastestream characteristics, can also impair the stripper's ability to remove other pollutants. Consequently, steam strippers are

operated to optimize overall removal of all of the volatile compounds in a particular plant's wastes-stream.

To develop the BAT steam stripping limitations, EPA reviewed performance data from many plants and then compiled a data base using data from the few plants that effectively use BAT-level steam strippers. As EPA has stated, the Agency then deleted certain data from its data base, retaining "only those data that are consistent with good or sound operation. . . . In the case of all pollutants, EPA has selected only a very small subset of the industry using the best available technology appropriately, and EPA has only used data that represented good performance." *See* EPA's Response to Comments, reprinted in the Appendix at p. 259a.

There were two plants in EPA's data base whose steam strippers outperformed all of the others: PPG Plant 913 and Dow Plant 415.¹ Recognizing the superior performance of the steam strippers at PPG Plant 913 and Dow Plant 415, EPA relied almost exclusively on data from those two plants to establish the BAT steam stripping limitations for the 28 volatile compounds. Indeed, no data from either plant were excluded from the data base during EPA's rigorous data editing process. Both the data themselves

¹ The performance of the steam strippers at Plants 913 and 415 was exemplary: Many of the volatile pollutants found in those plants' wastestreams prior to treatment could not even be detected after treatment, and at no time at either plant did the total of all volatile compounds in the wastestream after treatment exceed 1 part per million ("ppm"). Indeed, at both plants the total of all volatile compounds averaged less than a quarter of a part per million after treatment.

and EPA's method for editing those data demonstrate that PPG Plant 913 and Dow Plant 415 have BAT-level steam strippers; as EPA stated in the preamble, "only data representing BAT-level design and operation were retained for purposes of developing limitations." 52 Fed. Reg. at 42,540.

In light of the statutory command that limitations be achievable and attainable by the category or class of plants being regulated, 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(2)(A), one would have expected EPA to establish effluent limitations that could be attained by the two best steam strippers in the industry. However, neither plant can achieve the limitations for all pollutants. As the court below noted, a comparison of the BAT-level performance data with the limitations demonstrates that "PPG plant 913 exceeded the monthly average limit for chloroform, and Dow plant 415 exceeded the daily maximum limitation for trichloroethylene . . ." *CMA I*, 870 F.2d at 238; App. at 112a.

C. The Court's Decision

The court below acknowledged that neither PPG Plant 913, Dow Plant 415, nor any other plant in EPA's data base can comply with the full set of steam stripping limitations, but deemed this "irrelevant" as a matter of law. *CMA I*, 870 F.2d at 239; App. at 113a. According to the court, PPG Plant 913's inability to achieve the chloroform limitation was "irrelevant" because Dow Plant 415 could do so, while Dow Plant 415's inability to achieve the trichloroethylene ("TCE") limitation was "irrelevant" because PPG Plant 913 could do so. *Id.* The court's conclusion was based on its holding that, as a matter of statutory construction, EPA could demonstrate that an entire

set of limitations is achievable by selecting performance data from different plants for different pollutants, and can ignore as "irrelevant" data demonstrating that no plant can attain the full set of limitations. *Id.*

The Fifth Circuit did not find that PPG Plant 913 can alter its performance to achieve the chloroform limitation, and there is no basis in the record that would support such a conclusion. Regarding Dow Plant 415, the Fifth Circuit erroneously hypothesized that "EPA could reasonably conclude" that Plant 415's inability to achieve the TCE limitation was either due to an upset or a quality control problem. *CMA I*, 870 F.2d at 238-39; App. at 112a. The court did not and could not base such a conclusion on the record, however, because EPA did not reach this conclusion.² Indeed, because EPA excluded from the data base all data reflecting upsets and quality control problems, but did not edit any TCE data from Dow Plant 415, EPA must have concluded that the TCE exceedance did not result from an upset or quality

² The absence of such a conclusion is especially noteworthy because Dow Plant 415 was the subject of a comprehensive, month-long EPA study. The Agency was at the plant monitoring operations, sampling steam stripper influent and effluent, and analyzing the data at all times during the study, including the day on which the elevated TCE reading occurred. The study resulted in a 350-page Agency report on Plant 415's performance, yet the report nowhere mentions a steam stripper upset or quality control problem. At other plants studied by EPA, the Agency identified upsets and quality control problems and edited the data base accordingly. Had an upset or quality control problem occurred at Dow Plant 415, EPA would have noted that fact in the record and edited the resulting data from the Agency's data base.

control problem. See 52 Fed. Reg. at 42,540; *infra* pp. 17-19.

Despite EPA's determination that all of the data from PPG Plant 913 and Dow Plant 415 "represent[ed] BAT-level design and operation," 52 Fed. Reg. at 42,540, and despite the fact that this data demonstrate that neither plant can achieve all of the OCPSF limitations, the court below upheld the limitations. This decision presents a direct, acknowledged conflict with the Fourth Circuit's decision in *Tanners' Council* and is at odds with Justice (then Judge) Kennedy's opinion in *Association of Pacific Fisheries*, the Eighth Circuit's decision in *CPC International*, and the D.C. Circuit's decision in *National Lime*. Petitioner prays that the Court will grant this petition and resolve this conflict.

Additionally, all of the OCPSF limitations (i.e. those based on other technologies as well as those based on steam stripping) are unattainable because of the methodology used by EPA to develop the OCPSF limitations. In developing the limitations, EPA recognized all technology has its limits, and even the best designed and operated pollution control technology will experience fluctuations (or "variability") in performance. As the court below stated,

[t]he same plant using the same treatment method to remove the same toxic does not always achieve the same result. Tests conducted one day may show a different concentration of the same toxic than are shown by the same test the next day. This variability may be due the inherent inaccuracy of analytical testing, i.e., "analytical variabil-

ity," or to routine fluctuations in a plant's treatment performance.

CMA I, 870 F.2d at 228; App. at 89a. To prevent the occurrence of unavoidable exceedances, EPA must allow for all of the variability inherent in use of the EPA-designated technology.

Rather than do so, however, EPA used a statistical methodology that allows for only 99% of the inherent variability for the daily maximum limitation for each pollutant and only 95% of the inherent variability for the monthly average limitation for each pollutant. As all courts addressing the issue have held, when EPA does not allow for 100% variability, unavoidable exceedances will result. *See American Petroleum Institute v. EPA*, 661 F.2d 340, 350-53 (5th Cir. 1981); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1056-58 (D.C. Cir. 1978); *Marathon Oil*, 564 F.2d at 1266; *FMC Corp.*, 539 F.2d at 985-86. Consequently, other courts have required EPA to provide an affirmative defense or otherwise account for the unavoidable exceedances that result from EPA's use of less than 100% variability factors. *See National Lime*, 627 F.2d at 430-51; *Marathon Oil*, 564 F.2d at 1271-74; *FMC Corp.*, 539 F.2d at 985-86. However, the court below upheld the limitations even though EPA did not provide an affirmative defense or otherwise account for the expected unavoidable exceedances. Petitioner prays that the Court will grant this petition and resolve this additional conflict.

REASONS FOR GRANTING WRIT

I. THE COURT'S FAILURE TO REQUIRE EPA TO DEMONSTRATE THAT THE BEST PLANTS IN THE INDUSTRY CAN COMPLY WITH THE BAT LIMITATIONS CREATES A CONFLICT WITH FOURTH, NINTH, EIGHTH, AND D.C. CIRCUIT PRECEDENT ON AN ISSUE OF FUNDAMENTAL IMPORTANCE TO THIS AND OTHER RULEMAKING PROCEEDINGS.

A. The Decision of the Court Below Creates a Conflict Among the Circuit Courts.

Prior to this case, every court addressing the issue has held that limitations are not "achievable" within the meaning of the Act, 33 U.S.C. § 1311(b)(2)(A), when the record indicated that no plant in the regulated industry was able to achieve all of those limitations using the EPA-designated technology. To justify its unprecedented opinion to the contrary, the court below noted that BAT limitations may be based on the performance of "the single best performing plant in an industrial field." *CMA I*, 870 F.2d at 239; App. at 113a. Instead of requiring the Agency to demonstrate that the single best performing plant or plants can achieve all of the limitations, however, the court below held that achievability can be based on the performance of identical technology at different "best" plants "on a pollutant-by-pollutant basis."³ *Id.*

³ The court provided no statutory interpretation to support this conclusion, but relied solely on "deference" to EPA's alleged construction of the Act. *CMA I*, 870 F.2d at 239; App. at 113a. This alleged interpretation of the Act was neither articulated in the record nor in the Agency's brief, but was raised for the first time by the Department of Justice at oral argument. As such, the interpretation is a *post hoc* rationalization that is entitled to no deference. See *Securities Industry Ass'n v. Board*

The court unjustifiably concluded that as long as a hypothetical "best" plant—created by taking performance data for different pollutants from different plants—theoretically could achieve the full set of limitations, then it is irrelevant that no actual plant can do so. This holding ignores the technological limits inherent in simultaneously steam stripping numerous pollutants from multi-pollutant wastestreams. *See supra* pp. 5-6.

Moreover, the decision of the court below is contrary to all applicable precedent; it directly conflicts with the Fourth Circuit's decision in *Tanners' Council*, 540 F.2d at 1192, and is at odds with the Ninth Circuit's decision in *Association of Pacific Fisheries*, 615 F.2d at 816-20; the Eighth Circuit's decision in *CPC International*, 540 F.2d at 1338-40; and the D.C. Circuit's decision in *National Lime*, 627 F.2d at 430-51. In *Tanners' Council*, 540 F.2d at 1190-92, the court found that by using the EPA-designated technology, some plants could meet the limitations for one pollutant (TSS) and other plants could meet the limitations for another pollutant (BOD), but no plant could meet the limitations for both pollutants.⁴ Had the court in *Tanners' Council* determined the achievability of the tannery limitations by selecting per-

of Governors of the Federal Reserve System, 468 U.S. 137, 143-44 (1984). Moreover, this deference was improper because any such EPA "interpretation" would be contrary to law. *South-eastern Community College v. Davis*, 442 U.S. 397, 411-12 (1979).

⁴ Similarly, Dow Plant 415 can meet the limitations for chloroform, PPG Plant 913 can meet the limitations for TCE, but neither plant can meet the limitations for both pollutants, even though both plants use the identical EPA-designated technology. *CMA I*, 870 F.2d at 238-39; App. at 113a.

formance data for different pollutants from different plants, those limitations would have been upheld. However, the Fourth Circuit did not assess the limitations' achievability on a pollutant-by-pollutant basis, but instead remanded the tannery limitations because the entire set of limitations must be "achievable by the affected plants." *Tanners' Council*, 540 F.2d at 1192.

In *Association of Pacific Fisheries*, 615 F.2d at 817, Justice (then Judge) Kennedy stated that the "best" plants in the industry must be able to achieve all of the limitations with EPA-designated technology. The technologies at issue in *Association of Pacific Fisheries* were dissolved air flotation ("DAF") and aerated lagoons; EPA had designated each technology as BAT for different types of plants. When discussing DAF plants, the court stated that "EPA is . . . charged with the burden of showing that . . . the best existing DAF units can meet the *limitations*." *Id.* (emphasis added). Because all the limitations were met by "the best existing DAF units," those limitations were upheld. *Id.* However, because EPA had no data showing that two of the limitations could be achieved with aerated lagoons, the limitations for those two pollutants were remanded to EPA. *Id.* at 819. According to the Ninth Circuit, all of the limitations must be achievable by the best plant or plants.

In *CPC International*, the Eighth Circuit found that the model plant could meet the limitations for one pollutant (BOD), but not the other (TSS), and no plant could meet both limitations. Rejecting EPA's reliance on other evidence that allegedly implied that the TSS limitations could be achieved, the court struck down the TSS limitations and suggested that EPA set those

limitations at levels achievable by the model plant. 540 F.2d at 1338-40.

In *National Lime*, 627 F.2d at 430-51, the D.C. Circuit struck down standards of performance for lime manufacturing plants that had been promulgated pursuant to Section 111 of the Clean Air Act, 42 U.S.C. § 7411. The court held that EPA had not demonstrated that those standards were achievable when one out of the three best plants using the EPA-designated technology could not achieve the standards. The court stated:

[i]f, for unexplained reasons, one-third of the tested plants initially chosen by EPA for their well-controlled systems fail to meet the standard, the conclusion is just as plausible that the standard is not achievable as that the plants chosen did not have well controlled systems. It is up to EPA to dispel such doubts, and they have not done so here.

Id. at 444. Rather than require EPA to "dispel such doubts" here, the court below simply deemed "irrelevant" the fact that neither "best" plant can achieve all of the limitations.⁵

⁵ The court below tacitly admitted that PPG Plant 913 cannot achieve the limitations, but stated that "the industrial petitioners have failed to demonstrate that the Dow Plant is incapable of meeting the BAT₂ limitations." *CMA I*, 870 F.2d at 239; App. at 112a. The court's decision thus impermissibly shifted the burden of proof from EPA to petitioner. The Act requires that effluent limitations be achievable, 33 U.S.C. § 1311(b)(2)(A), and, as this Court has held, "[i]t is the proponent of a rule or order who has the burden of proof in administrative proceedings." *Industrial Union AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 653 (1980). Accordingly, EPA must demonstrate, based

B. This Issue Is Fundamental to This and Future Rule-makings Under the Clean Water Act.

Not only does the decision below create an unacceptable conflict among the circuits, but the issue raised is one of fundamental importance to this and to future EPA rulemaking proceedings under the Clean Water Act. The ultimate premise underlying technology-based limitations is that they can be achieved through use of the EPA-designated technology by the category or class of plants subject to regulation. *See 33 U.S.C. § 1311(b)(2)(A).* Where, as here and in most industries, plants have multi-pollutant wastestreams, the EPA-designated technology must be able to attain simultaneously all of the limitations. Permitting EPA to demonstrate the achievability of limitations that are based on a single technology with performance data from different plants for different pollutants negates this achievability requirement. The correct view, adopted by all of the other circuits that have addressed the issue, is to require EPA to demonstrate, with performance data from the best plants using the EPA-designated technology, that all of the limitations are achievable by the best plant or plants.

This conflict should be resolved now because the issue posed will recur in numerous future rulemaking proceedings under the Clean Water Act. Promulgation of effluent limitations under the Clean Water Act is an ongoing process; the Act requires EPA to review and, where appropriate, revise, effluent limitations for the more than 50 existing industrial categories on an annual basis, and requires EPA to

on evidence in the record, that the OCPSF industry can achieve the limitations.

promulgate limitations for new categories of sources as well. 33 U.S.C. § 1314(m). For example, EPA has recently announced its intention to develop limitations for five new industrial categories; to revise limitations for three existing industrial categories; to study eight industries to determine whether limitations are warranted; and to review limitations for three existing categories to determine whether they should be revised. 55 Fed. Reg. 80, 81 (1990). Unless the conflict among the circuits is resolved, EPA can be expected to follow the inappropriate course of action the Agency pursued here when it develops future effluent limitations. Accordingly, petitioner prays that the Court will grant this petition.

II. THE COURT'S HOLDING THAT EPA MAY PROMULGATE LIMITATIONS THAT PLANTS CAN BE EXPECTED TO EXCEED BECAUSE OF UNAVOIDABLE VARIABILITY IS AT ODDS WITH FOURTH, FIFTH, NINTH, AND D.C. CIRCUIT PRECEDENT ON AN ISSUE OF FUNDAMENTAL IMPORTANCE TO THIS AND OTHER RULEMAKING PROCEEDINGS.

EPA has admitted that it set all of the OCPSF limitations using variability factors of 99% for the daily maximum limitations and 95% for the monthly average limitations. Consequently, EPA admittedly failed to allow for 1% and 5% of the variability inherent in the use of EPA-designated technology. As every circuit addressing the issue has found, this failure will result in corresponding (1% and 5%) instances of noncompliance. *See American Petroleum Institute*, 661 F.2d at 351; *Weyerhaeuser*, 590 F.2d at 1056-58; *Marathon Oil*, 564 F.2d at 1266; *FMC Corp.*, 539 F.2d at 986. Indeed, EPA has itself acknowledged this fact, stating: "a discharger running a properly operated and maintained treatment facility has a 95-99% chance

of complying with its permit limits in any single monitoring observation." See EPA's "Training Manual for NPDES Permit Writers" at p. 17, reprinted in the Appendix at p. 261a. Thus, EPA's use of 99% and 95% variability factors in the OCPSF limitations can be expected to result in unavoidable exceedances for each pollutant 1% and 5% of the time, despite appropriate use of the EPA-designated technology.

Plants are required to comply with the OCPSF limitations 100% of the time, are strictly liable if they fail to do so, and must report all exceedances to EPA. 33 U.S.C. § 1311(a); 40 C.F.R. § 122.41(a) and (l)(6),(7). Consequently, when EPA has failed to account for all technological variability, other circuit courts have required EPA to provide an affirmative defense or otherwise account for the inevitable and unavoidable noncompliance. See *National Lime*, 627 F.2d at 430-51; *Marathon Oil*, 564 F.2d at 1272-74; *FMC Corp.*, 539 F.2d at 986. Nevertheless, the court below upheld EPA's use of 99% and 95% variability factors without a corresponding affirmative defense, stating incorrectly that the resulting 1% and 5% instances of noncompliance represent either upsets for which the upset defense is available,⁶ or quality control problems for which no defense is required. *CMA I*, 870 F.2d at 229-30; App. at 112a.

⁶ An upset is "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee." 40 C.F.R. § 122.41(n)(1). A permittee who has violated technology-based permit limitations as the result of an upset can use the upset defense as an affirmative defense to liability. See *id.* at § 122.41(n).

The Fifth Circuit's erroneous conclusion that the 1% and 5% exceedances resulted from upsets or quality control problems was based on the court's incorrect assumption that the limitations were derived from *all* of the data collected from the data base plants (*i.e.*, both the retained and the edited data), and that unreasonably high readings were excluded by setting the variability factors at 99% and 95% instead of at 100%. In fact, however, as the Agency has acknowledged, EPA first edited the data from the model plants to expunge all data "not representative of BAT technology performance," including "treatment system upsets[,] equipment malfunctions[, and] performance not up to design specifications." *CMA II*, 885 F.2d at 263; App. at 189a. Only *after* data representing upsets and quality control problems had been deleted from the data base were the 99% and 95% variability factors applied to formulate the limitations. Consequently, the data points that fell above the 99 and 95 percentiles of the *edited* data could not have resulted from upsets or quality control problems, but represented normal, expected variability in performance that occurs relatively infrequently, *i.e.*, 1% and 5% of the time.

On rehearing, the court apparently recognized the correctness of this reasoning; its only response was to assert, incorrectly, that EPA edited only whole sets of data from improperly operated or maintained plants, but "did not use its editing criteria to exclude individual data points." *Id.* This assertion is contradicted by the administrative record, which shows that EPA in fact edited individual data points representing inferior treatment from model plants whose data was otherwise used to set the limitations. For example,

EPA edited two days' worth of data from a third company's plant (Plant 725) "because steam stripper performance for those two days was considered inadequate." However, the remaining data from that third plant were used to set the limitations. *See Development Document for Effluent Limitations Guidelines and Standards for the OCPSF Industry*, at p. VII-190, reprinted in the Appendix at p. 263a.

The excluded data from this third plant may well have reflected an upset or quality control problem; the discharges were in excess of 3359 ppm and 1558 ppm. In contrast, Dow Plant 415's daily maximum TCE exceedance was .085 ppm and PPG Plant 913's monthly average chloroform exceedance was .129 ppm. These data were not edited, but were retained in the data base as data representing good performance. Significantly, because the exceedances experienced by Plants 913 and 415 did not result from upsets, the upset defense is inapplicable.

Because data representing inadequate performance were excluded from the data base prior to application of the variability factors, the 1% and 5% exceedances can be expected despite BAT-level performance. Since the limitations do not contain an applicable affirmative defense or otherwise account for these unavoidable exceedances, the OCPSF limitations are not "achievable" and "attainable" within the meaning of the Act, and the decision of the court below sustaining them is at odds with decisions of the Fourth, Fifth, Ninth, and D.C. Circuits in *FMC Corp.*, 539 F.2d at 936; *American Petroleum Institute*, 661 F.2d at 350-52; *Marathon Oil*, 564 F.2d at 1272; and *National Lime*, 627 F.2d at 430-51.

This issue is one of fundamental importance to this and future rulemaking proceedings under the Clean Water Act. As the D.C. Circuit recently stated, “[a] technology-based standard discards its fundamental premise when it ignores the limits inherent in the technology.” *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 208 (D.C. Cir. 1988). Moreover, as noted *supra* pp. 15-16, the Agency is both developing effluent limitations for new categories of sources and reevaluating the limitations imposed on the more than 50 existing industrial categories already subject to regulation. Unless the conflict among the circuits is resolved, EPA can be expected to follow, in the development of those limitations, the inappropriate course of action the Agency followed here. Accordingly, petitioner prays that the Court will grant this petition.

CONCLUSION

This petition should be granted both to resolve the conflict among the circuits and to correct errors of fundamental importance to this and future rulemakings under the Clean Water Act. As a result of the decision below, the most important check on the Agency’s rulemaking authority under the Clean Water Act has been vitiated. Allowing that decision to stand will permit EPA to promulgate technology-based limitations without making any meaningful demonstration that those limitations are achievable and attainable. Petitioner prays that the Court will grant this petition.

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